748 (34) (29)

Nos. 05-908, 05-915

Supreme Court, U.S.
FILED
OCT 10 2006
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,

Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *ET AL.*,

Respondents.

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,

Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *ET AL.*,

Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Sixth and Ninth Circuits

BRIEF *AMICI CURIAE* OF BRENNAN CENTER FOR JUSTICE, CENTER FOR CONSTITUTIONAL RIGHTS, DĒMOS, NATIONAL VOTING RIGHTS INSTITUTE, AND PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. Maintaining Diversity in Public Primary and Secondary Schools Is One of the Most Effective Ways to Propagate and Maintain Our Democratic Values and Thus Obtain the Promise of a Properly Functioning Democracy. 4

A. Racial Disparities and Perceived Differences Continue to Hamper the Realization of Our Democratic Ideals 4

B. Diverse Public Schools Are Essential to the Realization of Our Democratic Ideals. 6

C. Public Primary and Secondary Schools Play Critical Roles in Instilling Our Children with Democratic Values. 10

II. The School Districts' Efforts to Ensure Racial Diversity Pass Constitutional Muster. 13

A. The School Districts' Efforts to Maintain Diverse Public Schools Are Not Subject to Strict Scrutiny. 13

B. In Any Event, the Challenged Programs Survive Strict Scrutiny. 17

CONCLUSION 20

TABLE OF AUTHORITIES

Page

Cases

Abington Sch. Dist. v. Schempp,
374 U.S. 203 (1963) 7

Adarand Constructors, Inc. v. Pena,
515 U.S. 200 (1995) 15, 16

Ambach v. Norwick,
441 U.S. 68 (1979) 7

Bernal v. Fainter,
467 U.S. 216 (1984) 11

Bethel Sch. Dist. No. 403 v. Fraser,
478 U.S. 675 (1986) 9

Brown v. Bd. of Educ.,
347 U.S. 483 (1954) ..... *passim*

Campaign for Fiscal Equity, Inc. v. State,
655 N.E.2d 661 (N.Y. 1995) 10

Carter v. Jury Comm'r,
396 U.S. 320 (1970) 14

City of Cleburne v. Cleburne Living Ctr., Inc.,
473 U.S. 432 (1985) 16

City of Richmond v. J.A. Croson Co.,
488 U.S. 469 (1989) 15, 19

Columbus Bd. of Educ. v. Penick,
443 U.S. 449 (1979) 6

Comfort ex rel. Neumyer v. Lynn Sch. Comm.,
283 F. Supp. 2d 328 (D. Mass. 2003),
aff'd, 418 F.3d 1 (1st Cir. 2005) (en banc),
cert. denied, 126 S. Ct. 798 (2005) 12, 16, 17

Estes v. Metro. Branches of Dallas NAACP,
444 U.S. 437 (1980) 6

Freeman v. Pitts,
503 U.S. 467 (1992) 19

Gomillion v. Lightfoot,
364 U.S. 339 (1960) 17

Gratz v. Bollinger,
539 U.S. 244 (2003) 5, 6

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539 U.S. 306 (2003) ..... *passim*

Johnson v. California,
543 U.S. 499 (2005) 14

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480 U.S. 616 (1987) 11

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373 U.S. 61 (1963) 14

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739 F.2d 894 (3d Cir. 1984) 7, 11

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379 U.S. 184 (1964) 14

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515 U.S. 70 (1995) 19

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466 U.S. 429 (1984) 14

Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162 (9th Cir. 2005) (en banc) ..... *passim*

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457 U.S. 202 (1982) 7, 9

Regents of Univ. of Cal. v. Bakke,
438 U.S. 265 (1978) 15, 16

Ristaino v. Ross,
424 U.S. 589 (1976) 18

Skoros v. City of New York,
437 F.3d 1 (2d Cir. 2006) 8

Shaw v. Reno,
509 U.S. 630 (1993) 5

Swann v. Charlotte-Mecklenburg Bd. of Educ.,
402 U.S. 1 (1971) 14

Sweatt v. Painter,
339 U.S. 629 (1950) 10

Thornburg v. Gingles,
478 U.S. 30 (1986) 5

Tinker v. Des Moines Indep. Cmty. Sch. Dist.,
393 U.S. 503 (1969) 9

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458 U.S. 457 (1982) 6

Wieman v. Updegraff,
344 U.S. 183 (1952) 9

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406 U.S. 205 (1972) 9

Yick Wo v. Hopkins,
118 U.S. 356 (1886) 14

Constitutional Provisions

U.S. Const. amend. XIII 4

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Lia B. Epperson, *True Integration: Advancing* Brown*'s Goal of Educational Equity in the Wake of* Grutter, 67 U. Pitt. L. Rev. 175 (2005) 11

Letter from James Madison to W.T. Barry (Aug. 4, 1822), *reprinted in* 9 *The Writings of James Madison* 103 (Gaillard Hunt ed., 1910) 8

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Michael J. Sandel, *Democracy's Discontent: America in Search of a Political Philosophy* (1996) 9

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Remarks by the President in Ceremony Commemorating the 40th Anniversary of the Desegregation of Central High School (Sept. 25, 1997), *available at* http://clinton6.nara.gov/1997/09/1997-09-25-remarks-by-president-at-central-high-school-a.html 19

Reva B. Siegel,
Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown,
117 Harv. L. Rev. 1470 (2004) 15

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Educational Attainment in the United States tbl.1 (2004), *available at* http://www.census.gov/population/www/socdemo/education/cps2004.html 13

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The Writings of Thomas Jefferson (Memorial ed. 1903) 9

INTERESTS OF *AMICI CURIAE*[1]

Brennan Center for Justice at NYU School of Law. The Brennan Center unites thinkers and advocates in pursuit of a vision of inclusive and effective democracy. The Brennan Center's Democracy Program seeks to bring the ideal of representative self-government closer to reality. It strives to ensure that public policy and institutions reflect the diverse voices and interests that make for a rich and energetic democracy.

Center for Constitutional Rights. The Center for Constitutional Rights (CCR) is a non-profit legal and educational organization dedicated to protecting and advancing the rights guaranteed by the U.S. Constitution and the Universal Declaration of Human Rights. CCR uses litigation proactively to advance the law in a positive direction, to empower poor communities and communities of color, to guarantee the rights of those with the fewest protections and least access to legal resources, and to strengthen the broader movement for constitutional and human rights.

Dēmos. Dēmos is a non-profit, non-partisan organization whose purpose is to help build a society in which America can achieve its highest ideals. Dēmos believes that this requires a robust and inclusive democracy, with high levels of electoral participation and civic engagement, and an economy where prosperity and opportunity are broadly shared. Mutual understanding and respect of America's diverse citizenry lie at the core of that vision. Voluntary school integration programs, such as those at issue here, can

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[1] The parties have filed letters with the Court consenting to all amicus briefs. No counsel for a party has authored this brief in whole or in part and no person or entity, other than amici, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

measurably advance Dēmos' ambitious mission. By promoting diversity and inclusion, voluntary school integration programs help engender the understanding of and respect for differing viewpoints, backgrounds and experiences—essential predicates for a vibrant democracy and an equitable society.

National Voting Rights Institute. The National Voting Rights Institute (NVRI) is a non-partisan, non-profit legal organization committed to making real the promise of American democracy, a democracy where meaningful political participation and power is accessible to all regardless of economic or social status. Through litigation and public education, NVRI aims to vindicate the constitutional right of all citizens, regardless of their economic status, to participate in the electoral process on an equal and meaningful basis. Because of the importance of public schools in shaping our nation's commitment to democratic values, NVRI views voluntary school integration programs such as those challenged here as vital to the goal of securing a robust and inclusive democracy.

Puerto Rican Legal Defense and Education Fund. The Puerto Rican Legal Defense and Education Fund (PRLDEF) is a national non-profit civil rights organization founded in 1972, dedicated to protecting and furthering the civil rights of Puerto Ricans and other Latinos through litigation and education. Since its inception, PRLDEF has participated both as direct counsel and as *amicus curiae* in numerous cases throughout the country concerning the proper interpretation of the civil rights laws.

SUMMARY OF ARGUMENT

Public schools instill in our children civic virtue. They have since the founding of this Country. And, since *Brown v. Board of Education*, this Court has found that integrated and diverse public schools perform one additional role: they impart the values necessary to a multi-ethnic democracy that promises equality to all.

Diverse public schools promote these democratic values by inculcating racial understanding, racial tolerance, and the certain knowledge that there is more to a person or an issue than race. They do so by providing the Nation's youth with daily opportunities for face-to-face interactions with those of other races and ethnicities. They reach young children at an age when prejudices and misconceptions about race have not yet formed. And, the mandatory nature of public school attendance ensures that they have an impact on the majority of American citizens.

That they would perform this function has been recognized and lauded. For good reason. It is necessary that our children be prepared to exercise the franchise and engage in civic duties free from deleterious racial prejudice. Moreover, despite the progress made in the wake of *Brown*, we are still in the formative stages of building a society in which the color of one's skin is not a measure of ability or character. Given this, public schools should be *encouraged* to adopt, and most certainly should not be prohibited from adopting, policies that allow our children to socialize with children of other races, study, play, and cooperate with them. All this is of immeasurable benefit to our democracy, which should be animated by our common values rather than hamstrung by imagined racial differences.

Because of the obvious and universally recognized benefits of diverse public schools, and because their enrollment plans do not seek to segregate or impose penalties

based on race, the efforts of Seattle and Louisville to achieve diversity in their schools should *not* be subject to the strictest constitutional scrutiny. The Court should afford Seattle and Louisville the same deference it has historically afforded local school districts.

But even under a strict scrutiny analysis, the challenged enrollment plans easily pass constitutional muster. It is difficult to imagine a government interest more immediate or compelling than the propagation and maintenance of our democratic institutions. The Seattle and Louisville districts have adopted narrowly tailored plans, carefully designed to advance an important government interest, and therefore, under even a strict standard of review, the enrollment plans do not offend the Constitution.

ARGUMENT

I. MAINTAINING DIVERSITY IN PUBLIC PRIMARY AND SECONDARY SCHOOLS IS ONE OF THE MOST EFFECTIVE WAYS TO PROPAGATE AND MAINTAIN OUR DEMOCRATIC VALUES AND THUS OBTAIN THE PROMISE OF A PROPERLY FUNCTIONING DEMOCRACY.

A. Racial Disparities and Perceived Differences Continue to Hamper the Realization of Our Democratic Ideals.

Brown v. Board of Education, 347 U.S. 483 (1954), and the cases that followed it, promised a democracy where all have an equal voice and an equal chance regardless of race, bringing to life for the first time the post–Civil War Amendments' guarantee of full citizenship for all. U.S. Const. amends. XIII, XIV and XV. These cases promised a democracy whose values can be expressed in terms of racial equality, racial tolerance and understanding. However, to realize those values and to maintain a properly functioning

democracy where race does not inhibit opportunity, it is not enough simply to legislate equality and invoke ideals of racial harmony. Such things do not occur by fiat; they require learned behaviors and dedicated practice.

Indeed, although it has been some fifty-two years since *Brown*, racial segregation and inequality are still with us. Racial disparities persist as a result of an admixture of *de facto* segregation, discrimination, and residential and socioeconomic patterns. *See Gratz v. Bollinger*, 539 U.S. 244, 299-300 (2003) (Ginsburg, J., dissenting) (surveying data on residential segregation, income disparity, access to education and healthcare). We continue to confront an America that is "balkanize[d] ... into competing racial factions." *Shaw v. Reno*, 509 U.S. 630, 657 (1993).

Race remains a critical variable in the opportunities afforded to our citizens. *See Grutter v. Bollinger*, 539 U.S. 306, 333 (2003) ("Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters."). Race remains a central feature of our democracy, as reflected in the continuing role it plays in our elections and politics. *See, e.g., Thornburg v. Gingles*, 478 U.S. 30 (1986); *see also* Bernard Grofman, Lisa Handley, & David Lublin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. Rev. 1383, 1400 (2001) (discussing voting patterns and noting race-based preferences in candidate selection).

Of course, much progress towards racial equality has been made since *Brown v. Board of Education*, in part because of this Court's Equal Protection jurisprudence. As history has demonstrated, an integrated society cannot be created overnight. In 1954, there were few black children like Linda Brown who lived in or near a white neighborhood.

Yet, still today, children grow up primarily among those of their own race. *See, e.g.*, U.S. Census Bureau, *Racial and Ethnic Residential Segregation in the United States: 1980-2000* (2002) (documenting residential segregation), *available at* http://www.census.gov/hhes/www/housing/housing_patterns/pdf/censr-3.pdf; *see also Gratz*, 539 U.S. at 299 n.4. It is no exaggeration to say that, for many children, their most extended and meaningful interactions with those of other races take place at their public schools. Diversity programs, such as those at issue in this case, promise to help reduce racial disparity, and, in so doing, to strengthen the foundation of our democracy.

B. Diverse Public Schools Are Essential to the Realization of Our Democratic Ideals.

It is already settled that diverse schools are important to racial equality and to a democracy that functions based on common values rather than racial prejudice, animus, or misconception. "Attending an ethnically diverse school" helps students "prepar[e] ... 'for citizenship in our pluralistic society,'" by teaching them "'to live in harmony and mutual respect' with children" of different backgrounds. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 473 (1982) (quoting *Estes v. Metro. Branches of Dallas NAACP*, 444 U.S. 437, 451 (1980) (Powell, J., dissenting), and *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 485 n.5 (1979) (Powell, J., dissenting)).

Diversity in schools knits together our heterogeneous society:

> We are a nation of minorities and our system thus depends on the ability and willingness of various groups to apprehend those overlapping interests that can bind them into a majority on a given issue; prejudice blinds us to overlapping interests that in fact exist.

* * *

> Increased social intercourse is likely not only to diminish the hostility that often accompanies unfamiliarity, but also to rein somewhat our tendency to stereotype .... The more we get to know people who are different in some ways, the more we will begin to appreciate the ways in which they are not, which is the beginning of political cooperation.

John Hart Ely, *Democracy and Distrust* 153, 161 (1980) (2002 ed.).

That schools should perform the function of fostering a *demos* capable of such cooperation is uncontroversial. Diverse schools allow "cross-racial understanding, [which] helps to break down racial stereotypes, and enables students to better understand persons of different races." *Grutter*, 539 U.S. at 330 (internal quotation marks and brackets omitted).

Moreover, it has long been acknowledged that schools—and specifically public schools—fulfill an important social function beyond teaching the proverbial three Rs. This Court has "recognized 'the public schools as a most vital civic institution for the preservation of a democratic system of government' and as the primary vehicle for transmitting 'the values on which our society rests.'" *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring), and *Ambach v. Norwick*, 441 U.S. 68, 76 (1979)). This Court underscored the point in *Grutter*: "We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society." 539 U.S. at 331 (quoting *Plyler*, 457 U.S. at 221); *see also Kromnick v. Sch. Dist. of Phila.*, 739 F.2d 894, 905 (3d Cir. 1984) ("Schools are great instruments in teaching

social policy, for students learn not only from books, but from the images and experiences that surround them. One such lesson is of a spirit of tolerance and mutual benefit ...."); *cf. Skoros v. City of New York*, 437 F.3d 1, 18 (2d Cir. 2006) (explaining that schools "teach the lesson of pluralism by showing children the rich cultural diversity of the city in which they live and by encouraging them to show tolerance and respect for [religious] traditions other than their own").

The notion that schools are necessary to the propagation and maintenance of our democratic values did not originate with this Court. This Court has merely echoed the sentiments of our Nation's Founders. In praising Kentucky's public education system, Madison noted:

> A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.

Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* 9 *The Writings of James Madison* 103 (Gaillard Hunt ed., 1910).

And, somewhat more prosaically, Jefferson offered this opinion:

> [Education] is the most certain, and the most legitimate engine of government. Educate and inform the whole mass of the people. Enable them to see that it is their interest to preserve peace and order, and they will preserve them. And it requires no very high degree of education to convince them of this. They are the only sure reliance for the preservation of our liberty.

6 The Writings of Thomas Jefferson 391-92 (Memorial ed. 1903); *see also* Michael J. Sandel, *Democracy's Discontent: America in Search of a Political Philosophy* 321 (1996) (noting that schools, among other civic institutions, "form the 'character of mind' and 'habits of the heart' a democratic republic requires. Whatever their more particular purposes, those agencies of civic education inculcate the habit of attending to public things"); Press Release, *President Bush Addresses NAACP Annual Convention* (July 20, 2006) ("The America we seek should be bigger than politics ... we can work together to reduce the obstacles for opportunity for all our citizens. And that starts, by the way[,] with education."), *available at* http://www.whitehouse.gov/news/releases/2006/07/20060720.html.

However our shared values may have shifted since the times of the Founders, the emphasis on the importance of education as a means of preserving our democratic society has remained constant. "'[S]ome degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.'" *Plyler*, 457 U.S. at 221 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972)); *see also Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (the inculcation of civic values is "truly the 'work of the schools'" (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969))); *Wieman v. Updegraff*, 344 U.S. 183, 225 (1952) (Frankfurter, J., concurring) ("The process of education has naturally enough been the basis of hope for the perdurance of our democracy on the part of all our great leaders, from Thomas Jefferson onwards."); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1175 (9th Cir. 2005) (en banc)

("[D]iversity encourages students not only to think critically but also democratically.").[2]

C. Public Primary and Secondary Schools Play Critical Roles in Instilling Our Children with Democratic Values.

Schools occupy a unique position in Americans' lives. Without discounting the roles of parents and family, this Court and the Nation's Founders recognized that schools—primary and secondary schools—are the principal institution that will instill the shared values we depend upon as a democratic society. As recognized by the Court of Appeals in *Parents Involved*, 426 F.3d at 1174-76, primary and secondary public schools have three advantages over any other institution.

1. ***Face-to-face socialization.*** Schools present opportunities for students of different races to interact with one another—studying alongside one another, joining student groups, participating in school athletics, and forging close friendships. *See Grutter*, 539 U.S. at 328-30; *see also Sweatt v. Painter*, 339 U.S. 629, 634 (1950) (African-American students attending racially segregated law school would be disadvantaged by denying them interaction with white students, faculty, and alumni). They provide opportunities for students to learn from teachers of different races,

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[2] "[S]ome 40 states' constitutions specifically mention the importance of civic literacy among citizens, and at least 13 state constitutions have been interpreted to state that preparation for democratic citizenship is a central purpose of their educational systems." Michael A. Rebell *et al.*, *Today's Students, Tomorrow's Citizens: Preparing Students for Civic Engagement* at 2 (Campaign for Fiscal Equity 2003) (collecting sources); *see, e.g.*, *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661, 666 (N.Y. 1995) ("[Public] education [required by the state constitution] should consist of the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting or serving on a jury.").

exposing them to different adult points of view, dispelling notions of racial difference, and supplying them with potential role models and advisors. *See Johnson v. Transp. Agency*, 480 U.S. 616, 647 (1987) (Stevens, J., concurring); *Kromnick*, 739 F.2d at 905 (*citing Bernal v. Fainter*, 467 U.S. 216, 220 (1984)); *cf.* Goodwin Liu, Brown, Bollinger, *and Beyond*, 47 How. L.J. 705, 755 (2004) (noting *Grutter*'s conclusion that "'diminishing the force of [racial] stereotypes' is a compelling pedagogical interest" (quoting *Grutter*, 539 U.S. at 333)). Plus, classroom diversity "increases the likelihood that students will discuss racial or ethnic issues," and "brings different viewpoints and experiences to classroom discussions ...." *Parents Involved*, 426 F.3d at 1174.

These formative interactions lay a foundation for a lifetime free of racial prejudices and stereotypes, for all children, regardless of race and background:

> Studies have shown that desegregative policies benefit children of all races. Meaningful interaction between students from racially diverse backgrounds leads to an increased sense of civic engagement and increases the likelihood that such students will grow up socializing across racial boundaries and discussing racial matters. These benefits include greater toleration of, and appreciation for, members of other racial backgrounds, a greater sense of civic and political engagement, and an increased desire to live and work in multiracial settings as adults.

Lia B. Epperson, *True Integration: Advancing* Brown*'s Goal of Educational Equity in the Wake of* Grutter, 67 U. Pitt. L. Rev. 175, 199 (2005) (footnotes omitted).

2. ***The impressionability of youth.*** Public schools are ideal fora for imparting racial tolerance because children are much more amenable to instruction than are adults. The

minds of the young, moreover, are less likely to be tainted by invidious racial prejudices. "The reality is that attitudes and patterns of interaction are developed early in life and, in a multicultural and diverse society such as ours, there is great value in developing the ability to interact with individuals who are very different from oneself." *Parents Involved*, 426 F.3d at 1194 (Kozinski, J., concurring).

> [S]tereotypes about race and (visible) ethnicity set in early and are extremely difficult to correct in adolescence and adulthood. ... Stereotypes do not as easily take hold of children who interact early and often with children of other racial and ethnic groups. ... [R]acial stereotyping [is] a "habit of mind" that is difficult to break once it forms. It is more difficult to teach racial tolerance to college-age students; the time to do it is when the students are still young, before they are locked into racialized thinking.

Comfort ex rel. Neumyer v. Lynn Sch. Comm., 283 F. Supp. 2d 328, 356 (D. Mass. 2003), *aff'd*, 418 F.3d 1 (1st Cir. 2005) (en banc), *cert. denied*, 126 S. Ct. 798 (2005).

3. ***Nearly universal public primary and secondary education.*** Finally, public schools are unique in the breadth of their reach: Some 87% of all children attend public school for some or all of their primary or secondary education, including 83% of white children, 93% of African-American children, and 93% of Hispanic children. *See* U.S. Census Bureau, *School Enrollment—Social and Economic Characteristics of Students* tbl.5 (Oct. 2004), *available at* http://www.census.gov/population/www/socdemo/school/cps2004.html. This is, literally, a once-in-a-lifetime opportunity to teach our citizens racial tolerance by exposing them to students and teachers of different backgrounds.

And, if diversity is a compelling interest in law school admissions, *see Grutter*, 539 U.S. at 325; *see also infra* Point

II.B, it must be even more so in primary and secondary schools. Law schools, and even colleges, educate only a small portion of our society. *See* U.S. Census Bureau, *Educational Attainment in the United States* tbl.1 (2004), *available at* http://www.census.gov/population/www/socdemo/education/cps2004.html (only about 25% of U.S. adults graduate from college, and about double that number receive any post-secondary education). It cannot be that racial equality and the inculcation of such a fundamental value as racial tolerance should be reserved only for the academic elite. *See* Liu, *supra*, 47 How. L.J. at 755 ("[I]f diminishing the force of [racial] stereotypes is a compelling pedagogical interest in elite higher education, it can only be more so in elementary and secondary schools—for the very premise of *Grutter*'s diversity rationale is that students enter higher education having had too few opportunities in earlier grades to study and learn alongside peers from other racial groups." (internal quotation marks and footnotes omitted)).

II. THE SCHOOL DISTRICTS' EFFORTS TO ENSURE RACIAL DIVERSITY PASS CONSTITUTIONAL MUSTER.

Against this backdrop, a voluntary effort to maintain diversity in schools passes strict scrutiny. Our democratic values and the functioning of our democracy depend on such heterogeneity in the classroom. That said, we first pause to note that strict scrutiny is in fact not the appropriate standard.

A. The School Districts' Efforts to Maintain Diverse Public Schools Are Not Subject to Strict Scrutiny.

Voluntary programs like those employed by the Seattle and Louisville school districts should not be subject to strict scrutiny because they neither segregate students by race, nor impose any race-based penalties. The districts are doing nothing more than performing a task to which deference is owed:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.

Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971).

The plans at issue in these cases do not seek to promote, encourage, or demand segregation. *See, e.g., Johnson v. California*, 543 U.S. 499 (2005) (prisons); *Johnson v. Virginia*, 373 U.S. 61 (1963) (public facilities); *Brown*, 347 U.S. 483 (schools). They do not resemble rules or regulations that take away some right granted only to one race, but not another. *See, e.g., Carter v. Jury Comm'r*, 396 U.S. 320 (1970); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (ordinance prohibiting the operation of laundries in wooden buildings absent a permit was unconstitutional when only white applicants were granted permits). Nor are they like a prohibition on interracial cohabitation, *McLaughlin v. Florida*, 379 U.S. 184 (1964), or race-based limitations on parental rights, *Palmore v. Sidoti*, 466 U.S. 429 (1984).

The districts' plans stand in contrast to these cases, just as they stand in contrast to traditional "affirmative action" cases. Affirmative action programs have been characterized as a zero-sum process, whether in higher education or public contracts: individuals of a particular group are given preference with respect to the allocation of a limited resource. *See Grutter*, 539 U.S. 306 (university admissions policy using race as a criterion was subject to strict scrutiny);

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (federal highway construction program benefiting minority companies was subject to strict scrutiny); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (plurality opinion) (city's minority set-aside program was subject to strict scrutiny); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (admissions program designating a specific number of spots in program for minority students was subject to "most exacting judicial examination").

The plans at issue here neither oppress members of minority groups nor burden the majority. They do not seek to segregate the races. Quite the opposite. The districts' goals are to maintain diverse schools in residentially segregated cities—where *de facto* segregation would otherwise result in racially homogenous and insular educational communities. *See also infra* at Point II.B. The programs do not stigmatize or punish individuals based on race. The programs, thus, do not run afoul of *Brown*. The racial equality that *Brown* promised is not realized in a society where race cannot matter. It is realized in a society in which race is not the basis of penalty or subordination. *See* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 Harv. L. Rev. 1470 (2004).

Moreover, the school assignment plans are not like the programs at issue in the affirmative action cases. First, there is no stigma that can attach from not being admitted into a particular primary or secondary school. No child is labeled as "not being good enough." The children are not left without viable options, because every child in Louisville and Seattle is guaranteed a seat in a public school. Further, one's economic fortunes do not ride on the placement. This stands in contrast to the award of a public contract or admission to a graduate school—either of which could impact one's financial prospects, limit one's future options, or create a

perception as to one's abilities. The programs at issue here use race only to maintain school diversity by determining which schools particular students will attend, not whether they will attend school at all or receive any type of award or special treatment.

Second, inasmuch as particular students may be burdened by the schools' schemes, this burden falls on both white and non-white children equally. This is not a process where the benefit—attendance at one school—will necessarily redound to the benefit of a non-white student, as is the case in virtually every affirmative action case. *See, e.g.*, *Grutter*, 539 U.S. 306; *Adarand Constructors*, 515 U.S. 200; *Bakke*, 438 U.S. 265. Benefits and burdens are shared by members of all races so as to accomplish their shared goals: diversity in public education.

For these reasons, much like the diversity plan approved by the First Circuit in *Comfort v. Lynn School Committee*, the Seattle and Louisville plans are "fundamentally different from almost anything that the Supreme Court has previously addressed." 418 F.3d 1, 27 (1st Cir. 2005) (en banc) (Boudin, C.J., concurring). As a result, and because the plans are not offensive to the values of equality embodied in the Fourteenth Amendment, they should not be subjected to the same exacting review used for invidious forms of discrimination. Instead, they warrant a different approach.

Judge Kozinski has suggested an alternative: a "robust and realistic rational basis review, where the courts consider the actual reasons for the plan in light of the real-world circumstances that gave rise to it." *Parents Involved*, 426 F.3d at 1194 (Kozinski, J., concurring) (citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985)). Under such a standard, these programs easily pass constitutional muster. The districts' goals are to maintain diverse schools in residentially segregated cities—where *de facto* segregation would otherwise result in racially

homogeneous and insular educational communities. To solve this problem, they developed plans to "stir[] the melting pot," which improved school integration and diversity. *Id.* Because these plans implicate none of the "'original evils at which the Fourteenth Amendment was addressed,'" this Court should show appropriate deference to the school boards' decisions. *Id.* at 1195 (quoting *Comfort*, 418 F.3d at 29 (Boudin, C.J., concurring)).

B. In Any Event, the Challenged Programs Survive Strict Scrutiny.

Even were strict scrutiny applied, the Seattle and Louisville programs pass constitutional muster. As this Court has recognized, achieving diversity in schools is a compelling interest, *see Grutter*, 539 U.S. at 326-27, and the programs are narrowly tailored to that end.

Indeed, as this Court noted in *Grutter*, not all governmental uses of race are invalid. There is, in fact, a fundamental difference between taking race into account for the purposes of achieving diversity, and using racial classification to subjugate or segregate a despised minority. *See Grutter*, 539 U.S. at 327 ("Context matters when reviewing race-based government action under the Equal Protection Clause."); *Gomillion v. Lightfoot*, 364 U.S. 339, 343-44 (1960) ("[I]n dealing with claims under broad provisions of the Constitution ... it is imperative that generalizations based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts.").

Moreover, our civic life and our democratic principles require diversity in schools. "Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." *Grutter*, 539 U.S. at 332. It is this acknowledgement—that we are part of a shared

community—that will keep our democracy healthy and prevent sectarian divisions and balkanization from fracturing us into many Americas.

And, again, if the diversity rationale applies to a highly selective law school, it must apply with even greater force in the primary and secondary education setting, where educators can reach a broader, younger, and more impressionable audience. If the *Grutter* Court was apprehensive about the pipeline to national leadership, this Court should be concerned about the quotidian members of the electorate who are largely educated in America's public schools.

That we should value such equality and a unified Nation hardly needs to be stated. But to underscore it: as citizens, we must interact and collaborate. We inhabit political units (cities, counties, congressional districts, and states) that are larger and more heterogeneous than any school district, let alone a single school. We serve as jurors judging our peers; we vote and are elected for public office; we serve our country in the military; we work together. In short, we must coexist as equals. In all of these areas, the ability to operate without irrational prejudices and stereotypes is essential.

The Constitution demands no less when it guarantees, for example, a criminal defendant the right to an "impartial jury" free of racial or other prejudices that could mar its deliberations. *See, e.g.*, *Ristaino v. Ross*, 424 U.S. 589, 594-95 (1976). It is essential to our national security: "[A] highly qualified, racially diverse officer corps educated and trained to command our nation's racially diverse enlisted ranks ... to provide national security." *See* Consol. Br. of Lt. Gen. Julius W. Becton, Jr. *et al.*, as *Amicus Curiae* at 5, *Grutter*, 539 U.S. 306 (Nos. 02-241, 02-516), 2003 WL 1787554. And the more that citizens can come to understand the common interests that transcend race, the less the country

is likely to suffer from the racially polarized voting that taints too many of our elections. *See supra* at 5.

Nor is there a more narrowly tailored means of obtaining this result. *See Grutter*, 539 U.S. at 333 (noting that any program must be narrowly tailored); *J.A. Croson Co.*, 488 U.S. at 493 (same). In public primary and secondary schools, there are no reliable and "workable race-neutral alternatives that will achieve ... diversity." *Grutter*, 539 U.S. at 339. The school districts have no means to counteract the unwanted segregation that results from housing choices other than voluntary integration programs that expressly acknowledge the disfavored racial isolation. For example, there are no court-imposed legal remedies available for school segregation when that segregation results from things such a housing patterns. This, despite the recognition that: "The effect of changing residential patterns on the racial composition of schools, though not always fortunate, is somewhat predictable. Studies show a high correlation between residential segregation and school segregation." *Freeman v. Pitts*, 503 U.S. 467, 495 (1992); *see also Missouri v. Jenkins*, 515 U.S. 70, 116 (1995) (Thomas, J., concurring) ("The continuing 'racial isolation' of schools after *de jure* segregation has ended may well reflect voluntary housing choices or other private decisions."); Press Release, *Remarks by the President in Ceremony Commemorating the 40th Anniversary of the Desegregation of Central High School* (Sept. 25, 1997) ("Segregation is no longer the law, but too often, separation is still the rule."), *available at* http://clinton6.nara.gov/1997/09/1997-09-25-remarks-by-president-at-central-high-school-a.html.

To bring it full circle then, when this Court in *Brown* started this Country on the path to racial equality, it recognized the role public schools play in bringing about that goal. This Court "consider[ed] public education in the light

of its full development and its present place in American life throughout the Nation." 347 U.S. at 492-93. Having done so, it recognized "the importance of education to our democratic society" and specifically noted that "it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Id.* at 493. What was true then, remains true today.

CONCLUSION

For these reasons, the judgments of the courts of appeals should be affirmed.

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October 10, 2006